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Casenotes

CITIZEN SUITS UNDER THE CLEAN WATER ACT: POST-COMPLAINT COMPLIANCE DOES NOT MOOT REQUESTS FOR PENALTIES, *ATLANTIC STATES LEGAL FOUNDATION V. TYSON FOODS*

I. INTRODUCTION

In May of 1986, Tyson Foods Inc. (Tyson) purchased a poultry processing plant in Blountsville, Alabama.[1] The plant was discharging several pollutants[2] into two creeks pursuant to a National Pollutant Discharge Elimination System (NPDES) permit issued by state authorities under section 402 of the Clean Water Act.[3] At the time of Tyson's purchase, the plant was discharging beyond the limits imposed by the permit.[4] Although Tyson was in the process of designing an improved wastewater treatment pro-

1. Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128 (11th Cir. 1990). The Blountsville plant was one of several acquired when Tyson bought out Lane Processing, Inc., which was bankrupt. *Id.* at 1130. Lane Processing (owner of Spring Valley Foods, which had operated the plant), "had no capital to invest in constructing a new wastewater treatment facility." Brief for Appellee at 8, *Tyson*, 897 F.2d 1128 (No. 89-7232).

2. *Tyson*, 897 F.2d at 1130 n.1. The regulated pollutants discharged included BOD5 (Biochemical Oxygen Demand - 5 day), TSS (Total Suspended Solids), FEC (fecal coliform), and O & G (oil and grease). *Id.* After December 1987, NH3N (Ammonia Nitrogen) and TKN (Total Kjeldahl Nitrogen) were also regulated. *Id.*

3. Section 402(b) of the Clean Water Act (CWA) states in pertinent part:

> [T]he Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law. In addition, such State shall submit a statement from the attorney general . . . that the laws of such State . . . provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist.

33 U.S.C. § 1342(b) (1988). The permits issued under this authority are called National Pollutant Discharge Elimination System (NPDES) permits. *Tyson*, 897 F.2d at 1130. Additionally, under section 308 of the Act, the discharging plant's operator is required to file Discharge Monitoring Reports (DMR's) that specify the amount of pollutants actually being discharged, and the discharges the NPDES permit allows. CWA § 308, 33 U.S.C. § 1318(a) (1988).

4. *Tyson*, 897 F.2d at 1130.

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cess,[5] Tyson continued to operate the plant in violation of its permit.[6] In April 1987, Atlantic States Legal Foundation (ASLF) filed a 60-day notice to Tyson of its intent to file a citizen suit based on Tyson's permit violations.[7] In August 1987 ASLF filed a citizen suit against Tyson in federal district court, seeking injunctive relief, civil penalties, and costs under section 505 of the Clean Water Act.[8] Tyson continued to operate the plant in violation of its permit until February 1988, when the new treatment facility became operational.[9] Once the treatment system was in place, Tyson argued that the entire suit was rendered moot because there was no possibility that violations would recur in the future.[10]

In September 1987, the district court stayed ASLF's discovery of Tyson until Tyson's motion to dismiss ASLF's suit for alleged lack of standing was decided.[11] In March 1988, the court dismissed Tyson's motion,[12] but continued the stay of discovery

5. Tyson had, by January of 1987, completed a "Final Design Summary of Wastewater Treatment Facilities," and in May 1987, began construction of a new wastewater treatment system. *See* Brief for Appellant at 8, *Tyson*, 897 F.2d 1128 (No. 89-7232). Tyson spent approximately $2.6 million upgrading its wastewater treatment system. *Id.* at 9.

6. *Tyson*, 897 F.2d at 1132. According to ASLF, Tyson committed 57 daily and 16 monthly violations of its NPDES permit before suit was filed against it, and 34 daily and 8 monthly post-complaint violations. *Id.*

7. *Id.* at 1131. The purpose of giving notice before filing a citizen suit is two-fold: First, it gives the alleged violator "an opportunity to bring itself into compliance with the [Clean Water] Act." *Id.* (quoting Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987)). Second, it gives federal and state authorities the opportunity to file their own enforcement action. *Id.* at 1131 n.4. *See also* Hamker v. Diamond Shamrock Chem. Co., 756 F.2d 392, 395-96 (5th Cir. 1985).

8. Section 505 of the Clean Water Act states in pertinent part:

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

33 U.S.C. § 1365 (1988).

9. *Tyson*, 897 F.2d at 1132. Tyson alleged that after February 1988, it had not exceeded its NPDES permit limitations for any pollutant. *Id.*

10. Brief for Appellee at 12, *Tyson*, 897 F.2d 1128 (No. 89-7232).

11. *Tyson*, 897 F.2d at 1131.

12. Between the time that Tyson moved for dismissal and the district court's denial of that motion, the Supreme Court had established jurisdictional requirements for citizen suits under the Clean Water Act. *See* Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 484 U.S. 49, 64 (1987) [hereinafter *Gwaltney I*], *aff'd in part, rev'd in part* 890 F.2d 690 (4th Cir. 1989) [hereinafter *Gwaltney II*]. ASLF had accordingly amended its complaint, and the district court held that ASLF met the requirement by alleging that Tyson's violations were

until Tyson's upgraded waste treatment system could be evaluated.[13] The stay was finally lifted in July 1988, and in March 1989, the court granted Tyson's motion for summary judgment, holding that ASLF's requests for relief were moot.[14] On appeal, the United States Court of Appeals for the Eleventh Circuit reversed and remanded, holding that a citizen's claim to civil penalties and costs does not become moot once the violator comes into compliance, as long as the violations were proved to be ongoing at the time suit was filed.[15]

II. CITIZEN SUITS UNDER THE CLEAN WATER ACT

Section 505 of the Clean Water Act provides that "any citizen" may bring a civil suit "against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter."[16] Citizen suits are considered an enforcement mechanism to supplement, rather than replace government enforcement efforts,[17] and as such are considered primarily prospective in nature.[18] The Supreme Court held in *Gwaltney of Smithfield v. Chesapeake Bay Foundation*[19] (*Gwaltney I*) that in order to invoke the federal court's jurisdiction over such a suit, a citizen-plaintiff must allege that a defendant is committing "continu-

ongoing at the time suit was filed. Atlantic States Legal Foundation v. Tyson Foods, 682 F. Supp. 1186, 1189-90 (N.D. Ala. 1988).

13. *Tyson Foods*, 682 F. Supp. at 1190. The court reasoned that the case would probably be rendered moot when Tyson's upgraded wastewater system became operational, rendering a stay appropriate until the system was evaluated. *Id.*

14. *Id.* The district court held that, based on its reading of *Gwaltney I*, ASLF's suit could be rendered moot by the possibility of Tyson's post-complaint compliance with its NPDES permit. *Id.*

15. *Tyson*, 897 F.2d at 1134-35.

16. Clean Water Act § 505, 33 U.S.C. § 1365. For the text of section 505, see *supra* note 8.

17. *Gwaltney I*, 484 U.S. at 60. The Court refers to the Senate Report in its characterization of citizen suits: "[t]he Committee intends the great volume of enforcement actions [to] be brought by the State, and that citizen suits are proper only if the Federal, State, and local agencies fail to exercise their enforcement responsibility." *Id.* (quoting S. REP. No. 411, 92d Cong., 1st Sess. 64 (1971), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 1482 (1973)). *See also* Note, *Citizen Suits and the Clean Water Act: The Supreme Court Decision in Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 4 UTAH L. REV. 891, 894 (1988).

18. *Gwaltney I*, 484 U.S. at 59. The Court in *Gwaltney I* considered "the pervasive use of the present tense" in section 505 as substantial proof that citizen suits were meant to seek relief from existing violations, rather than past ones. *Id.* *See also* City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008, 1014 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980).

19. 484 U.S. 49 (1987).

ous or intermittent violation[s]."[20]

Under section 402 of the Clean Water Act, once a state is so authorized by the federal Environmental Protection Agency (EPA), it can issue NPDES permits allowing the limited discharge of specified pollutants into navigable waters.[21] A discharger found to be exceeding the limits of this permit "shall be subject to a civil penalty not to exceed $25,000 per day for each violation."[22]

Section 505 of the Clean Water Act authorizes the district court to "enforce such an effluent standard or limitation" by providing injunctive relief, and by applying "any appropriate civil penalties under section 309 of the Clean Water Act."[23] The civil penalties component of citizen suits, separated from injunctive relief, was the focus of the court's decision in *Tyson*.[24]

Federal courts have come up with varied, and at times, contradictory interpretations of the citizen suit provisions of the Clean Water Act.[25] There have been conflicting interpretations of two predominant components of citizen suits: (1) the circumstances under which civil penalties can be imposed; and (2) applying mootness doctrine to the assessment of such penalties.[26]

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20. *Id.* at 64.

21. For the applicable text of section 402, see *supra* note 3.

22. Section 309(d) of the Clean Water Act states in pertinent part:
> Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 [Section 402] of this title by the Administrator, or by a State . . . shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1319 (1988). Civil penalty fines are paid directly to the U.S. Treasury. *Tyson*, 897 F.2d at 1131 n.5.

23. CWA § 505, 33 U.S.C. § 1365. For the text of section 505, see *supra* note 8. For a list of the factors a court must consider in determining an appropriate penalty, see *supra* note 22.

24. 897 F.2d at 1132. The court framed the main issue in the case as "whether the district court erred as a matter of law in holding that ASLF's claim for civil penalties became moot once Tyson came into compliance and injunctive relief was no longer appropriate." *Id.*

25. *See generally* Note, *Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 MICH. L. REV. 1656 (1987).

26. Before the Court decided the *Gwaltney I* case in 1987, there was a three-way split among the Courts of Appeals for the Fifth, Fourth, and First Circuits on the question of how jurisdiction is established under section 505 of the Clean Water Act. Before *Gwaltney I*, the Fifth Circuit had held that in order for jurisdic-

These two components are usually intertwined with the issue of when a federal court can attain jurisdiction over citizen suits.[27]

A. Establishing Jurisdiction of Clean Water Act Citizen Suits

To establish federal court jurisdiction, the citizen-plaintiff need only make a good faith allegation[28] that a defendant's violations of the Clean Water Act were "ongoing" at the time suit was filed.[29] In *Chesapeake Bay Foundation v. Gwaltney of Smithfield*,[30] (*Gwaltney II*) the Fourth Circuit, on remand from the Supreme Court, defined ongoing violations as either: (1) violations that continue on or after the date the complaint was filed; or (2) violations that a reasonable trier of fact would find had a continuing likelihood of recurring intermittently or sporadically.[31]

In *Gwaltney*,[32] the defendant company owned a meat-packing

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tion to attach in a Clean Water Act citizen suit, the "complaint must allege a violation occurring at the time the complaint is filed." *Gwaltney I*, 484 U.S. at 55-56 (quoting Hamker v. Diamond Shamrock Chem. Co., 756 F.2d 392, 395 (5th Cir. 1985)). The Fourth Circuit, in deciding the case that ultimately led to the *Gwaltney I* decision, rejected the Fifth Circuit's approach, holding that section 505 of the Clean Water Act allowed citizens to bring suit based on wholly past violations. Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 791 F.2d 304, 309 (4th Cir. 1986). The First Circuit took yet another view, allowing a citizen suit to be brought "when there is a pattern of intermittent violations, even if there is no violation at the moment suit is filed." *Gwaltney I*, 484 U.S. at 56 (citing Pawtuxet Cove Marina v. Ciba-Geigy Corp., 807 F.2d 1089, 1094 (1st Cir. 1986)). Because the standard for determining jurisdiction involves assessing whether there is a state of "continuing or intermittent violations," the jurisdictional test is often closely linked to the issue of whether civil penalties may be imposed. The only difference between the two standards, generally speaking, is that for jurisdictional purposes ongoing violations need only be alleged in good faith, whereas if civil penalties are to be imposed, the citizen-plaintiff must *prove* the ongoing violations. *See Gwaltney II*, 890 F.2d at 696-97.

27. *Gwaltney II*, 890 F.2d at 693. For a discussion of how jurisdiction relates to ongoing violations, see *supra* note 26.

28. FED. R. CIV. P. 11. Rule 11 states in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record . . . A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper . . . The signature of an attorney or party constitutes a certificate by the signer . . . that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

Id. See Sierra Club v. Union Oil Co., 853 F.2d 667,669 (9th Cir. 1988) (Citizen plaintiff's allegations should be developed after reasonable inquiry and must be well-grounded in fact).

29. *Gwaltney I*, 484 U.S. at 64.

30. 890 F.2d 690 (4th Cir. 1989).

31. *Id.* at 693.

32. The underlying facts of both *Gwaltney I* and *Gwaltney II* are the same. *Gwaltney I* is the Supreme Court decision, which remanded the case for further

business that had repeatedly violated its NPDES permit between 1981 and 1984.[33] The company, however, had improved its wastewater treatment facilities between March 1982 and October 1983, so that the last reported violation was in May 1984.[34] The citizen-plaintiffs had sent notice of intent to sue in February 1984, but did not file suit until June 1984, seeking declaratory and injunctive relief, in addition to the imposition of civil penalties, attorneys fees, and costs.[35]

A year earlier, the Fourth Circuit held in *Sierra Club v. Simkins Industries*[36] that once it has been alleged that violations continued past the date suit was filed, the court has jurisdiction over the suit.[37] Once this jurisdictional requirement has been met, and the citizen-plaintiff has proved the existence of such violations, the court can then assess civil penalties even if violations ceased after suit was brought.[38] Both *Simkins* and *Gwaltney II* emphasized the filing date of the suit as the crucial point in determining whether violations were "ongoing."[39] However, the *Simkins* court commented that while "good faith allegations [of ongoing violations] were sufficient to meet threshold jurisdictional challenges, the Supreme Court also stated [in *Gwaltney I*] that in order to prevail, a citizen-plaintiff must *prove* a continuing violation."[40]

B. Determining Mootness of Clean Water Act Citizen Suits

The Court in *Gwaltney I* touched upon the issue of mootness only enough to create more vagueness than had already existed concerning how to apply mootness doctrine to citizen suits under the Clean Water Act.[41] First the Court stated that "citizens, unlike

proceedings to the Fourth Circuit Court of Appeals. *Gwaltney II* refers to the Fourth Circuit's decision, reached after the District Court for the Eastern District of Virginia had reinstated its original verdict, and Gwaltney had appealed to the Fourth Circuit.

33. *Gwaltney I*, 484 U.S. at 53-54.

34. *Id.* at 54.

35. *Id.*

36. 847 F.2d 1109 (4th Cir. 1988). In this case, the defendant (Simkins Industries) violated the reporting and records retention requirements specified in its NPDES permit by failing to sample and monitor its effluent discharges. *Id.* at 1115.

37. *Id.* at 1115.

38. *Id.* at 1113-15.

39. *Id.* at 1114-15. The filing date of the suit was seen as the date for establishing ongoing violations for both jurisdictional purposes and to prove grounds for the imposition of civil penalties. *See id.*; *Gwaltney II*, 890 F.2d at 693.

40. *Simkins*, 847 F.2d at 1114 (emphasis added).

41. *See Tyson*, 897 F.2d at 1134. The *Tyson* court found that there were two possible interpretations of *Gwaltney I*'s discussion of mootness and that neither

the Administrator, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation."[42] Later in the opinion, the Court extolled the position that a citizen suit may *not* be maintained where "there is no reasonable expectation that the wrong will be repeated."[43] The Court concluded that "[m]ootness doctrine thus protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing."[44] The burden of proving that the case is moot is on the defendant.[45]

However, on remand, the Fourth Circuit in *Gwaltney II* made it clear that a citizen suit was *not* rendered moot if a defendant came into compliance with the Act after a citizen suit was filed. "In our view, the penalty factor keeps the controversy alive between plaintiffs and defendants in a citizen suit, *even though the defendant has come into compliance and even though the ultimate judicial remedy is the imposition of civil penalties assessed for past acts of pollution.*"[46] The court further clarified its position by stating that "if the plaintiffs prove an ongoing violation at trial, the violations are related to present wrongdoing."[47]

Two cases have dealt directly with the issue of mootness of citizen suits brought under the Clean Water Act. In *National Resources Defense Council v. Outboard Marine Corp.*,[48] the District Court

directly addressed the application of mootness principles to a citizen suit where there is post-complaint compliance. *Id.* The *Tyson* court stated that the *Gwaltney I* opinion "appears to be only addressing the mooting of injunctive relief" because all the cases cited in support of the mootness principles dealt only with injunctive relief, and "did not focus on damages." *Id.* at 1134 n.11. The *Tyson* court concluded that *Gwaltney I* "does not make clear whether the plaintiff's request for civil penalties is mooted as soon as defendant's compliance moots the plaintiff's prayer for injunctive relief." *Id.*

42. *Gwaltney I*, 484 U.S. at 59.

43. *Id.* at 66 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)).

44. *Id.* at 66-67.

45. *Id.* at 66.

46. *Gwaltney II*, 890 F.2d at 696 (emphasis added). Tyson argued in its brief that *Gwaltney II* was factually distinguishable from its case because Gwaltney's violations were proved likely to recur, whereas Tyson's were not. Brief for Appellee at 36, *Tyson*, 897 F.2d 1128 (No. 89-7232). *See Gwaltney II*, 890 F.2d at 695.

47. *Gwaltney II*, 890 F.2d at 697. The *Gwaltney II* court held that once a Clean Water Act violation had been proved to be ongoing at the time suit was filed, "the court is virtually obligated to assess penalties." *Id.* Violations that occurred after the filing of a citizen suit were deemed to be "ongoing" for purposes of assessing civil penalties against a violator. *See id.*

48. 692 F. Supp. 801 (N.D. Ill. 1988).

for the Northern District of Illinois in dictum implied that if a defendant had begun to comply with the Clean Water Act after suit was filed, this would "pose a potential for mootness."[49] In order to show that violations are "ongoing," the court stated that it "must be alleged in good faith . . . that defendant has not cured the source of discharge violations so that no more violations will occur."[50] However, the defendant must carry the burden of showing with absolute certainty that the alleged violations could not reasonably be expected to recur in order for the case to be rendered moot.[51]

The District Court for the Northern District of Indiana, in *Atlantic States Legal Foundation v. Universal Tool*,[52] held that the citizen-plaintiff's suit was not moot because the defendant had not met its burden of showing that the violations had ended.[53] However, the court also embraced the conclusion that the controversy continued as long as there was an assessment of penalties for violations that were "part of" or "contiguously preceded the ongoing violations."[54]

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49. *Id.* at 812. In this case, the National Resources Defense Council (NRDC) alleged that Outboard Marine had committed several violations of its NPDES permit after NRDC filed suit, and the court held that this was sufficient for jurisdiction to attach. *Id.* at 815. The court further held that because Outboard Marine had not put in place any remedial measures to prevent further violations, it had not proved that further violations would not occur, and therefore, had not shown the case to be moot under *Gwaltney I*'s requirements. *Id.*

50. *Id.* at 814.

51. *Id.* at 815.

52. 735 F. Supp. 1404 (N.D. Ind. 1990). Universal Tool, a manufacturer of jacks for automobiles, discharged wastewater containing several pollutants from its manufacturing process into navigable waters pursuant to an NPDES permit obtained from the State of Indiana. *Id.* at 1408. Universal violated its permit limits several times both before and after ASLF filed a citizen suit against it in August 1987. *Id.* The court found that because Universal had continued to violate its permit after ASLF had filed suit, the suit could not be dismissed as moot based on *Gwaltney II*'s analysis. *Id.* at 1418-19.

53. *Id.* at 1419. In *Gwaltney I*, the Court stated that "[t]he defendant must demonstrate that it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney I*, 484 U.S. at 66 (quoting United States v. Phosphate Export Ass'n, 393 U.S. 199, 203 (1968) (emphasis added by *Gwaltney I* Court)).

54. *Universal Tool*, 735 F. Supp. at 1418 (quoting *Gwaltney II*, 890 F.2d at 696-97). The court in *Universal Tool* agreed with *Gwaltney II*'s finding that "to the extent plaintiff has established that there were ongoing violations at the time litigation was commenced, the case was not moot even though a defendant had subsequently come into compliance with its permit limitations." *Id.* The citizen-plaintiff need only prove that violations continued when suit was filed in order to have civil penalties assessed for violations that occurred *before* suit was brought. *Id.* Mootness doctrine, however, combined with *Gwaltney I*'s interpretation of the Clean Water Act's citizen suit provisions as prospective in nature, do not allow civil penalties to be imposed for violations "wholly unconnected to any present

C. When Can Civil Penalties Be Imposed?

In dealing with the imposition of civil penalties based on Clean Water Act citizen suits, post-*Gwaltney I and II* courts have come to differing conclusions. On one side, the District Court for the District of Massachusetts in *National Resources Defense Council v. Gould, Inc.*[55] held that the imposition of civil penalties would be "linked to plaintiff's proof that [the defendant] has committed post-complaint violations."[56] The court reasoned that this was required under *Gwaltney I*'s judgment that the focus of Clean Water Act citizen suits be "forward-looking."[57] However, in *Sierra Club v. Union Oil Co.*,[58] the Ninth Circuit held that once a citizen-plaintiff proves that defendant's violations are ongoing, penalties may be imposed for past and present violations.[59]

Another approach to civil penalties in citizen suits was taken in *Student Public Interest Research Group v. Monsanto*,[60] a case affirmed by the Third Circuit in 1989. In that case, the District Court for the District of New Jersey ruled that the "taint" of a past violation continues into the future, and the statute gives courts the power to impose any appropriate civil penalty—including penalties for violations that occurred before suit was filed.[61]

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or future wrongdoing." *Gwaltney I*, 484 U.S. at 67. *See also Gwaltney II*, 890 F.2d at 697.

55. 733 F. Supp. 8 (D. Mass. 1990).

56. *Id.* at 10. The district court in *Gould* had, in an October 1989 opinion, held that civil penalties could only be assessed for violations that occurred *after* suit was filed. NRDC v. Gould, 725 F. Supp. 634 (D. Mass. 1989). However, following the Fourth Circuit's decision in *Gwaltney II* and the plaintiff's request that the court revise its holding, the district court modified its opinion to allow discretionary consideration of civil penalties for past violations *if* they were linked to post-complaint violations. *Gould*, 733 F. Supp. at 9-10.

57. *Id.* at 9. For a discussion of the prospective nature of Clean Water Act citizen suits, see *supra* note 18 and accompanying text.

58. 853 F.2d 667 (9th Cir. 1988). In this case, Sierra Club filed suit against Union Oil alleging that 76 permit violations had occurred before suit was filed. *Id.* at 668. The Ninth Circuit remanded the case to the district court for the purpose of determining whether Sierra Club could *prove* the presence of ongoing violations at the time suit was filed. *Id.* at 670. If Sierra Club met this burden, civil penalties could be assessed for the past violations. *Id.*

59. *Id.* at 670-71. For a discussion of the definition of "ongoing violations," see *infra* text accompanying notes 99-101.

60. 600 F. Supp. 1474 (D.C.N.J. 1985), *aff'd* 891 F.2d 283 (3d Cir. 1989). In this case, the plaintiffs alleged that defendant Monsanto Company had violated its permit limits 236 times by discharging pollutants into the Delaware River from its Bridgeport, New Jersey plant. *Monsanto*, 600 F. Supp. at 1475.

61. *Id.* at 1476. The court rejected any interpretation of the Clean Water Act citizen suit provision, section 505, that "would permit a defendant to escape liability for past violations by present compliance." *Id.* at 1477. Although the court recognized that the Clean Water Act citizen suit provisions are "somewhat

The *Monsanto* holding appears to be in conflict with *Gwaltney I* in that the court reads the citizen-suit statute "as conferring on citizens the same power to seek relief as is conferred on the Government, *including the right to seek penalties for past violations*."[62] It is apparent that after *Gwaltney I*, the courts are still uncertain about whether a civil suit is rendered moot once a defendant comes into compliance after suit is filed.[63]

III. ANALYSIS OF THE ELEVENTH CIRCUIT'S DECISION IN *TYSON*

Against this background, the Court of Appeals for the Eleventh Circuit decided whether ASLF's claim for civil penalties became moot when Tyson came into compliance with the Clean Water Act after ASLF had filed suit against Tyson. The court first reviewed *Gwaltney I*'s treatment of how the court obtains jurisdiction over a citizen suit,[64] and when such a suit becomes moot.[65] In order to invoke the court's jurisdiction, a citizen-plaintiff must "allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future."[66] The court concluded that in order for jurisdiction to attach, the citizen need only make a good faith allegation that violations are continuing at the time suit is filed.[67] In

equivocal," it held that a "plausible construction of [section 505's] language is that one is "in violation," and continues to be "in violation" by having "violated." *Id.* at 1476. For the pertinent text of section 505 of the Clean Water Act, see *supra* note 8.

62. *Monsanto*, 600 F. Supp. at 1476-77 (emphasis added). The Court in *Gwaltney I* held that section 505 does not allow citizen suits to be brought for wholly past violations. *Gwaltney I*, 484 U.S. at 64. The Court contrasted this limitation with the federal Environmental Protection Agency's ability to bring suit against Clean Water Act violators for either past or present violations. *Id.* at 59.

63. *See generally* Note, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation: Its Implications for Citizen Suits Under the Clean Water Act*, 16 ECOLOGY L.Q. 571, 587-92 (1989) (author discusses issues left unresolved by *Gwaltney I*, including issue of *when* citizen suits can be rendered moot).

64. *Tyson*, 897 F.2d at 1133. The court emphasized at the beginning of its analysis of *Gwaltney I* that "[i]t is important to note . . . that *Gwaltney [I]* dealt primarily with the question of jurisdiction and not mootness." Although the court acknowledged that *Gwaltney I* did not deal squarely with the "relationship between mootness and civil penalties," it nonetheless considered *Gwaltney I*'s holding applicable to the instant case. *Id.*

65. *Id.* at 1133-34. The *Tyson* court found that the Court's discussion of mootness in *Gwaltney I* did not clearly resolve the issue of "whether the plaintiff's request for civil penalties is mooted as soon as the defendant's compliance moots the plaintiff's prayer for injunctive relief." *Id.* at 1134.

66. *Id.* at 1133 (quoting *Gwaltney I*, 484 U.S. at 57).

67. *Id.* For a discussion of what constitutes an ongoing violation, see *infra* text accompanying notes 99-101.

addressing the issue of mootness, the *Tyson* court found that *Gwaltney I* could be interpreted in two ways. First, a suit could be dismissed as moot, even after jurisdiction has properly been attained, if it is later discovered that violations were not ongoing at the time suit was filed.[68]

The second possible interpretation, however, was that a suit could be dismissed as moot if a defendant came into compliance *after* suit was filed.[69] The court determined that this interpretation only applied to the mooting of injunctive relief, leaving open the application of mootness principles to civil penalties when there were ongoing violations at the time suit was filed.[70] As long as there were grounds for injunctive relief at the time suit was filed, the court stated that civil penalty relief was not automatically mooted.[71]

The court disagreed with the lower court's holding of mootness on two grounds. First, the court held that the district court's use of the time of summary judgment as the basis for determining whether violations were ongoing was erroneous.[72] Second, the lower court was wrong in finding that once injunctive relief becomes inappropriate, the civil penalties component of a citizen suit also becomes moot.[73]

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68. *Tyson*, 897 F.2d at 1134.

69. *Id.* This reading of *Gwaltney I* appears to come from the Court's statement that "[l]ongstanding principles of mootness, however, prevent the maintenance of suit when 'there is no reasonable expectation that the wrong will be repeated.' " *Gwaltney I*, 484 U.S. at 66 (quoting United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d Cir. 1945)). For additional discussion of the *Tyson* court's interpretation of *Gwaltney I* mootness discussion, see *supra* note 41.

70. *Tyson*, 897 F.2d at 1134.

71. *Id.* at 1135. The court added that "the showing necessary to maintain a suit for civil penalties must go beyond mere allegations. Plaintiffs must be able to *prove* that non-compliance was ongoing at the time they filed suit in order to be able to later maintain an action for civil penalties." *Id.*

72. *Id.* at 1134. The court held that "for purposes of assessing a plaintiff's allegations of ongoing violations, the court must always look to the date the complaint was filed." *Id.* The court found this interpretation of the Clean Water Act's citizen suit provision to be consistent with *Gwaltney I*: there the Court had held that "citizens, unlike the [U.S. Environmental Protection Agency] Administrator, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." *Gwaltney I*, 484 U.S. at 59. If violations continued after a suit was *filed*, then it would necessarily have been brought to enjoin an ongoing violation, and would have met *Gwaltney I*'s requirement. *See Tyson*, 897 F.2d at 1135.

73. *Tyson*, 897 F.2d at 1135. The court stated that "if the parties are able to make a valid request for injunctive relief at the time the complaint is filed, then they may continue to maintain a suit for civil penalties, even when injunctive relief is no longer appropriate." *Id.* In support of this statement, the court adhered to *Gwaltney II*'s finding that "the penalty factor keeps the controversy alive

The court instead designated the time of filing suit as the point when "ongoing violations" should be assessed, and held that the mooting of injunctive relief does not moot a request for civil penalties.[74] In finding the time of filing suit as the proper point of inquiry for determining "ongoing violations," the court found this consistent with *Gwaltney I's* requirement that only citizen suits brought to *abate* ongoing violations could seek civil penalties.[75] The court also held that *Gwaltney I* made it clear that "the term 'ongoing violation' refers to the time the suit was filed and not the time of trial."[76]

More importantly, the court emphasized its policy reasons for holding that post-complaint compliance would not moot a request for civil penalties.[77] First, the court recognized that citizen suits are an important "deterrence against future violations."[78] If a suit seeking civil penalties could be rendered moot by a defendant's post-suit compliance, this deterrence value would be less effective because a defendant could escape penalties altogether.[79] Furthermore, the court reasoned that citizens would be less likely to bring such suits if courts dismissed them after they had properly been brought under the Act.[80]

Second, if courts determined whether violations were "ongoing" at some point in time *after* suit has been brought, violators

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between plaintiffs and defendants in a citizen suit, even though the defendant has come into compliance." *Id.* (quoting *Gwaltney II*, 890 F.2d at 696).

74. *Id.* at 1135.

75. *Id.*

76. *Id.* at 1136. In a footnote, the court points to the Fourth Circuit's use of ongoing violations in connection with "the time suit was filed." *Id.* at 1136 n.14 (quoting *Gwaltney II*, 890 F.2d at 697). For a discussion of the "ongoing violations" standard's applicability to both jurisdiction and civil penalties, see *supra* note 26.

77. *Tyson*, 897 F.2d at 1136.

78. *Id.* (quoting Sierra Club v. Simkins, 847 F.2d 1109, 1113 (4th Cir. 1988)). Citizens suits, backed with the punishment of civil penalties and awarding of attorney's fees, can provide compelling incentive for polluters to cease violations on their own. *See generally* Note, *Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 MICH. L. REV. 1656 (1987). As the court in *Simkins* pointed out, shortly after the Sierra Club notified Simkins of its belief that Simkins was violating the terms of its NPDES permit, Simkins began complying. *Simkins*, 847 F.2d at 1113 n.5. However, if post-complaint compliance allows a polluter to avoid civil penalties, "there is no incentive for the polluter to comply with its permit until *after* it is sued, at which time it could comply and thus avoid all penalties for its actions." Brief for Appellant at 21, *Tyson*, 897 F.2d 1128, (No. 89-7232). In this way the deterrent effect of citizen suits would be greatly diminished.

79. *Tyson*, 897 F.2d at 1137.

80. *Id.* at 1137.

would be encouraged to delay litigation as long as possible, "knowing . . . they will thereby escape liability even for post-complaint violations, so long as violations have ceased at the time suit comes to trial or is decided on summary judgment."[81] Such a system would depend on the arbitrary scheduling of trials or rulings on motions, or, as in this case, could actually be manipulated by the district court's imposition of stays while the defendant was given a chance to comply.[82]

Having reversed the district court's first holding—that the case was moot because Tyson had come into compliance with its NPDES permit—the court then turned to the district court's alternative holding.[83] The lower court had declined to impose civil penalties against Tyson, even if the case was not moot, based on its equitable powers.[84] Tyson had argued in its brief on appeal that a court could, fully within its equitable powers, decline to impose penalties at all.[85] The appellate court dismissed this argu-

81. *Id.*

82. *Id.* The court, apparently disturbed by the district court's imposition of two lengthy stays in what appeared to be Tyson's favor, stated in a footnote that it would "not rule on the question of whether the district court abused its discretion in staying proceedings to allow Tyson to come into compliance with the Clean Water Act." *Id.* at n.16.

83. *Tyson*, 897 F.2d at 1137. The district court had held that "it would hardly be fair and just to impose civil penalties upon Tyson when in fact it has at all times herein acted in good faith." *Id.* at 1140 (citing district court's slip op. at 9). Tyson had argued that because the Clean Water Act does not limit the court's ability to exercise its equitable discretion, the district court was free to decide whether or not to impose civil penalties at all. Brief for Appellee at 12, *Tyson*, 897 F.2d 1128 (No. 89-7232). Tyson maintained that "the district court acted within its broad equitable discretion in determining that neither an injunction nor imposition of civil penalties was necessary or appropriate inasmuch as Tyson, acting in good faith and without regard to ASLF's filing suit, had brought its newly purchased plant into compliance quickly and effectively." *Id.* The basis for Tyson's argument was the Supreme Court's decision in *Weinberger v. Romero-Barcelo*, which held that "unless Congress clearly and explicitly denied or limited the district court's exercise of equitable discretion, the full scope of that equitable jurisdiction must be recognized and applied." *Id.* at 18 (citing *Weinberger*, 456 U.S. 303, 314 (1982)). The *Weinberger* case involved the Navy's discharge of ordnance into the waters off the Puerto Rico coast during offshore training exercises, and the Court had upheld the lower court's refusal to enjoin the exercises pending the Navy's obtaining of a permit for the discharge. *Weinberger*, 456 U.S. at 305. Using the *Weinberger* standard, Tyson argued that the Clean Water Act's section 309(d) did not *require* the court to impose civil penalties, but instead allowed the court to use its broad discretion in determining an appropriate penalty. Brief for Appellee at 19, *Tyson*, 897 F.2d 1128 (No. 89-7232).

84. *Tyson*, 897 F.2d at 1137.

85. *Id.* at 1140. Tyson argued that the relief ASLF requested "was inherently equitable in nature, thus bringing to bear the full scope of the court's equitable jurisdiction. The Clean Water Act, under which ASLF brought suit, contains no congressional limitation on the district court's equitable jurisdiction." Brief for Appellee at 12, *Tyson*, 897 F.2d 1128, (No. 89-7232).

ment as having "little bearing on the instant case," and instead read the civil penalties provision of the Clean Water Act as *mandating* the imposition of penalties when a violation had occurred.[86] The court reasoned that "a district court's discretion is constrained by . . . [the] enumeration of factors to be considered when assessing such a penalty."[87] Furthermore, the court held that section 309(d) of the Clean Water Act required that "civil penalties . . . be assessed against Tyson as a matter of law."[88]

IV. THE QUESTION OF MOOTNESS: WAS THE ELEVENTH CIRCUIT'S INTERPRETATION OF *GWALTNEY I* AND *II* CORRECT?

While the *Tyson* court's opinion appears to be consistent with existing caselaw, the factual situation of this case makes it difficult to analyze under present law. This case did not present the situation of a violator who "turned off the spigot" after having been given notice of a citizen-plaintiff's intent to sue, with the possible threat of returning to its wrongful behavior after the suit was resolved.[89] This was also not a case involving a chronic violator,

86. *Tyson*, 897 F.2d at 1140-41. The *Tyson* court found the *Weinberger* case inapplicable because that case dealt only with a district court's discretion in not issuing an injunction, and not with the issue of penalties. *Id.* at 1141. Instead, the *Tyson* court noted that section 309(d) of the Clean Water Act states that "any person who violates . . . any permit condition or limitation . . . *shall be subject to a civil penalty*." *Id.* at 1142 (citing 33 U.S.C. § 1319 (1988)). Because of this language, the court found that the district court had abused its discretion in not imposing any penalty at all. *Id.*

87. *Id.* at 1140. For a list of these factors, see *supra* note 22. The court took a hard line regarding penalties, stating that Clean Water Act civil penalties were designed not only to negate any economic gain a violator has reaped from noncompliance, but also to serve the goals of punishment and retribution. *Id.* at 1141. Tyson's "repeated violations" that continued past the time ASLF's complaint was filed could not be ignored, the court found. *Id.* The court gave the following instructions to the district court:

> [U]pon remand, the district court should first determine the maximum fine for which Tyson may be held liable. If it chooses not to impose the maximum, it must reduce the fine in accordance with the factors spelled out in section 1319(d), clearly indicating the weight it gives to each of the factors in the statute and the factual findings that support its conclusions.

Id. at 1142.

88. *Id.* For the text of section 309(d), see *supra* note 22. For a discussion of the court's conclusion that civil penalties were required, see *supra* note 86. It should be noted that after the Eleventh Circuit court remanded the case to the district court, Tyson and ASLF reached a settlement that was approved by the district court in October 1990. Telephone interview with Alfred F. Smith, Jr., Maynard, Cooper, Frierson & Gale P.C., attorney for Tyson Foods (October 1990).

89. *Hamker*, 756 F.2d 392, 399 (5th Cir. 1985) (Williams, J., specially con-

with recurring problems of keeping its effluent discharges within the limits of its NPDES permit.[90] In fact, it appears that Tyson's most serious mistake was continuing operation of its plant while it designed and built an improved wastewater treatment system.[91]

Once the new system became operational, ASLF never alleged that there was any "reasonable expectation that the wrong will be repeated."[92] It cannot be ignored, however, that if the district court had *not* imposed stays delaying discovery and a trial on the merits until Tyson's new wastewater treatment system was in place, the case would clearly not have been moot. Thus if the *Tyson* court had agreed with the lower court's decision, the timing that is so crucial for citizen suits could be easily manipulated by Clean Water Act violators.

No matter what side one argues from, *Gwaltney I*'s discussion of mootness is illusive. Several courts have attempted to decipher the meaning of this discussion.[93] *Gwaltney I*, it could be argued, suggested that if a defendant in a citizen suit could prove that it had come into compliance, and demonstrate with absolute certainty that "the allegedly wrongful behavior could not reasonably be expected to recur," the case would be rendered moot.[94] The

curring). A leak from an oil pipeline owned by the defendant had ceased before the citizen-plaintiffs brought suit, and the court held the plaintiffs did not meet its jurisdictional requirements. *Id.* at 394. In a concurring opinion, Circuit Judge Jerre S. Williams stated that "the requirement that the polluter be 'in violation' clearly is broad enough to cover the chronic episodic violator or the violator who intentionally 'turns off the spigot' just before a citizen brings suit." *Id.* at 399. This opinion, expressed two years before the Supreme Court's *Gwaltney I* opinion, parallels the Court's distinction between wholly past violations and intermittent violations. *See Gwaltney I*, 484 U.S. at 64.

90. On remand to the Fourth Circuit, it was shown in *Gwaltney II* that although the defendant had taken steps to comply with its permit, there was evidence that violations were likely to recur. *Gwaltney II*, 890 F.2d at 693-95.

91. The *Tyson* court dismissed the lower court's characterization of the defendant's compliance efforts as showing the "utmost good faith." *Tyson*, 897 F.2d at 1141. Instead, the court stated the following: "There was one simple and straightforward way for Tyson to avoid paying civil penalties for violations of the Clean Water Act: After purchasing the plant, Tyson could have ceased operations until it was able to discharge pollutants without violating the requirements of its NPDES permit." *Id.* at 1141-42.

92. *Id.* at 1134 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)). In its appellate brief, ASLF did not dispute the district court's finding that Tyson had come into compliance with its permit and "there appeared to be no reasonable likelihood of future violations." Brief for Appellant at 18, *Tyson*, 897 F.2d 1128 (No. 89-7232).

93. *See* Sierra Club v. Union Oil, 853 F.2d 667, 670 (9th Cir. 1988); ASLF v. Universal Tool, 735 F. Supp. 1404, 1417-18 (N.D. Ind. 1990); NRDC v. Outboard Marine, 692 F. Supp. 801, 812 (N.D. Ill. 1988).

94. *Gwaltney I*, 484 U.S. at 66. If a violator proved that a new treatment system precluded the possibility of further violations, then mootness principles

mootness doctrine, combined with *Gwaltney I*'s reading of the citizen-suit statute of the Clean Water Act as "primarily forward-looking,"[95] would seem to support a holding of mootness once an improved effluent treatment system is operational and no further violations have been reported.[96]

There is, however, more than one possible reading of *Gwaltney I*'s mootness statements, as the *Tyson* court correctly pointed out.[97] Tyson had argued that if a defendant proves there is no likelihood that violations will recur after post-complaint compliance measures are taken, *Gwaltney I* required that the suit be rendered moot.[98] Under this approach, the "ongoing violations" test for jurisdictional purposes becomes different from proving "continuous or intermittent" violations required for prevailing on the merits. If the courts were to follow this reasoning, the two-part test for "ongoing violations" created by the Fourth Circuit in *Gwaltney II* (and later adopted by the Ninth Circuit) would be misapplied.

Gwaltney II's two-part test states that "the citizen-plaintiffs could prove an ongoing violation *either* (1) by proving violations that continue on or after the date the complaint is filed, *or* (2) by

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were supposed to "protect defendants from the maintenance of suit . . . based solely on violations wholly unconnected to any *present or future wrongdoing*." *Id.* at 66-67 (emphasis added). Once violations have clearly ended, they are no longer connected with the present or the future, and become wholly past violations. This interpretation of *Gwaltney I* was employed by the district court in *Tyson*. 682 F. Supp. 1186, 1189-90 (N.D. Ala. 1988). It is also possible to argue that once a violator comes into compliance with the Clean Water Act, the prospective purpose of citizen suits to *abate* ongoing violations has been satisfied, and therefore the suit can no longer be maintained. For a discussion of Clean Water Act section 505's "forward-looking" language, see *supra* note 18 and accompanying text.

95. *Gwaltney I*, 484 U.S. at 59.

96. *Id.* at 69-70. Justice Scalia, in his concurring opinion in *Gwaltney I*, stated that the central issue in determining whether a citizen suit can be maintained (as opposed to being dismissed for having failed to meet the jurisdictional requirement) is "whether [defendant] had taken remedial steps that had clearly achieved the effect of curing all past violations by the time suit was brought." *Id.* (Scalia, J., concurring). This statement appears to support the *Tyson* court's holding that remedial action and compliance that occur after suit is brought do not affect the validity of the suit's claims for civil penalties. *See Tyson*, 897 F.2d at 1137.

97. *Tyson*, 897 F.2d at 1134.

98. *See* Brief for Appellee at 30-37, *Tyson*, 897 F.2d 1128 (No. 89-7232). The Court in *Gwaltney I* found that "[t]he most natural reading of [the] 'to be in violation' [language from section 505 of the Clean Water Act] is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney I*, 484 U.S. at 57. This characterization of the citizen suit provision of the Clean Water Act appears to support Tyson's argument.

adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations."[99] This test has also been applied by the Ninth Circuit (and now by the Eleventh Circuit) to establish ongoing violations for purposes of prevailing on the merits of a citizen suit.[100] The test clearly gives citizen-plaintiffs the option of proving only one or the other type of violation: either violations after the complaint has been filed or intermittent/sporadic violations.[101] Since ASLF, in the instant case, showed that Tyson had continued to violate its permit for five months after the complaint was filed,[102] it follows that they were not required to additionally prove intermittent or sporadic violations. Therefore, it appears that the *Tyson* court's holding was consistent with other court's applications of both *Gwaltney I and II*'s principles, even though there are no cases with exactly the same fact pattern as in *Tyson*.

V. THE LASTING EFFECTS OF *TYSON*

It is submitted that the *Tyson* court's holding is likely to have the effect of increasing, or at least not diminishing, the power of citizen suits as an enforcement mechanism of the Clean Water Act.[103] The court's policy reasoning makes it clear that even if a discharger has the best of intentions of conforming to its NPDES permit sometime in the future—evidenced by investing large sums of money designing and installing state-of-the-art waste treatment systems—they will not be permitted to violate their permit during the implementation of these plans.[104] Dischargers, if confronted with the choice between losing money by shutting down while treatment systems are improved or paying potentially astronomical civil penalties if an enforcement action is brought,[105] will face considerable pressure to comply with the

99. *Gwaltney II*, 890 F.2d at 693 (quoting Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, 844 F.2d 170, 171-72 (4th Cir. 1988) (emphasis added) (remand of *Gwaltney I* to district court)).

100. *Union Oil*, 853 F.2d at 667, 671.

101. *See Tyson*, 897 F.2d at 1134-35 n.12. *See also Simkins*, 847 F.2d at 1115 (once court concluded that violations had continued past date suit was filed, issue of intermittent or sporadic violations need not be reached).

102. For a description of Tyson's pre- and post-complaint violations, see *supra* note 6.

103. *See generally* Note, *Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 MICH. L. REV. 1656, 1672-74 (1987).

104. For a discussion of Tyson's installation of its wastewater treatment system, see *supra* note 5.

105. ASLF had alleged that the maximum penalty for Tyson's post-complaint violations would be in excess of $9 million. *Tyson*, 897 F.2d at 1142. It is

Act.

On the other hand, a decision like *Tyson* could have the effect of dissuading investors from buying old plants that need costly alterations to make them environmentally sound.[106] The court did not give much weight to Tyson's apparent good faith in working towards compliance,[107] even though this is one of the factors courts are allowed to consider in determining penalties.[108] This decision would also allow a citizen suit to be brought within days of a plant's coming into compliance, so that as long as violations were ongoing at the time suit was brought, a discharger would be held responsible for both pre- and post-complaint violations.[109]

Notwithstanding these possibilities, however, there is ample opportunity for a discharger to evaluate its options between the time a citizen-plaintiff has given 60-day notice of intent to sue, and the time suit is actually filed.[110] The *Tyson* court gave firm guidelines as to how civil penalties are to be applied in citizen suits. It also discussed underlying policy considerations that can be applied in many factual circumstances.[111] Based on these considerations, it appears that the *Tyson* court's opinion will provide

important to note, however, that Clean Water Act section 309(d) gives courts the ability to determine the amount of penalties by considering the "seriousness of the violation . . . , any good-faith efforts to comply . . . , the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. § 1319(d). Courts are, therefore, allowed to place heavy emphasis on good-faith efforts to comply with the Clean Water Act in determining penalties, which could reduce the amount drastically. However, for a discussion of the *Tyson* court's hard-line approach to penalties, see *infra* note 107 and accompanying text.

106. For a description of Tyson's acquisition of the plant at issue in this case, see *supra* note 1.

107. *Tyson*, 897 F.2d at 1141. The court instead emphasized evidence that Tyson had saved money by operating the plant in violation of its permit because it was cheaper to run the plant without the new treatment system. *Id.* The court also stated that "[civil] penalties are designed to punish violators for their noncompliance and to serve the goal of retribution." *Id.*

108. For the text of section 309(d) of the Clean Water Act, which describes the factors courts must consider in determining penalty amounts, see *supra* note 22.

109. *But see* Note, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation: Its Implications for Citizen Suits Under the Clean Water Act*, 16 ECOLOGY L.Q. 571, 590-91 (1989) (author discussed problem of dischargers having little incentive to stop violations until notice of intent to sue received).

110. For an explanation of the purpose of the notice requirement, see *supra* note 7.

111. For a discussion of the policy considerations discussed by the *Tyson* court, see *supra* text accompanying notes 77-80.

helpful guidance for both potential defendants and citizen-plaintiffs under the Clean Water Act.

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